IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CINCINNATI INSURANCE COMPANY,	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
	)	
	)	**No. 01-2610-CM**
v.	)	
	)	
	)	
PROFESSIONAL DATA SERVICES, INC. and HERAT OF AMERICA EYE CARE, P.A.,	)	
Defendants.	)	
	)	
	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Cincinnati Insurance Company (Cincinnati) has sued defendant Professional Data Services, Inc. (PDS) and Heart of America Eye Care, P.A. (HOA) seeking a declaratory judgment. This matter is before the court on defendant PDS's Motion for Summary Judgment (Doc. 38), plaintiff's Motion for Summary Judgment (Doc. 48), and plaintiff's Motion to Strike (Doc. 51). Defendant HOA joined (Doc. 65) in defendant PDS's Motion for Summary Judgment and defendant PDS's responses to plaintiff's Motion for Summary Judgment.

I. Summary Judgment Standards

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In

applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

Both parties have moved for summary judgment. This fact does not permit entry of summary judgment if disputes remain as to material facts. *Harrison Western Corp. v. Gulf Oil Corp.*, 662 F.2d 690, 692 (10th Cir. 1981). Rather, factual inferences tending to show triable issues must be considered in the light most favorable to the existence of those issues. *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975).

Having said that, the court points out that defendant PDS failed in its Motion for Summary Judgment to comply with Local Rule 56.1, which specifically requires that all facts "be numbered and shall refer with particularity to those portions of the record upon which movant relies." D. Kan. Rule 56.1(a). Defendant PDS failed to include numbered paragraphs within its statement of facts and also failed to refer to the record in support of its factual contentions. The court believes that defendant PDS instead intended to rely on the answers provided by plaintiff to defendant PDS's Request for Admissions, but defendant PDS failed to attach said answers as part of the record. To the extent that defendant PDS's statement of facts fails to refer to the evidentiary record, or if the court can find no support in the record before it, the court may not consider those alleged facts if not admitted by plaintiff.

In addition, defendant PDS's response to plaintiff's Motion for Summary Judgment wholly fails to controvert plaintiff's facts, which are appropriately numbered and referenced to the record in support thereof. Local Rule 56.1 requires that a party opposing a motion for summary judgment set forth each fact in dispute and refer with particularity to those portions of the record upon which it relies in disputing

such factual contentions. *Id.* 56.1(b)(1). Accordingly, those material facts which defendant PDS has failed to adequately controvert are deemed admitted for purposes of summary judgment. *Id.* 56.1(b)(2).

II. Facts

Defendant PDS is in the business of providing software and customer support for computer systems which assist in the management of medical clinics. Plaintiff insured defendant PDS pursuant to a primary general liability policy (the "Policy").

On April 12, 2002, defendant HOA filed suit against defendant PDS in the District Court of Johnson County, Kansas, in a case entitled *Heart of America Eye Care, P.A. v. Professional Data Services, Inc.*, 02-CV-02345 (the "Underlying Action"). In the Underlying Action, defendant HOA asserted claims for breach of contract, breach of warranty, negligence/malpractice, fraud, and negligent misrepresentation. Plaintiff requests the court to determine whether plaintiff is obligated to provide defendant PDS with a defense regarding the Underlying Action involving defendant HOA and whether plaintiff has a duty to indemnify defendant PDS regarding that action.

The events giving rise to the Underlying Action are as follows: In 1995, Advanced Medical Data Services (AMDS) entered into a Software License and Maintenance Agreement with defendant HOA (the "Agreement"). The Agreement provided defendant HOA with a license to use several software programs then owned by ADMS, including the Advanced Practice Manager Software (the "APM Software"). Additionally, under the Agreement, AMDS agreed to provide services to defendant HOA, including the investigation and correction of software problems.

In 1998, defendant PDS purchased the assets of AMDS, including the APM Software. Following defendant PDS's acquisition of AMDS, PDS owned the APM Software. Defendant PDS

continued to license the APM Software to defendant HOA and agreed to maintain, support, and service the software for HOA. Defendant PDS also was thereafter contractually obligated to defendant HOA for the investigation and correction of problems with the APM Software, and further agreed to provide skilled software implementation and support to defendant HOA.

The petition in the Underlying Action alleges that defendant PDS failed to perform in accordance with the Agreement in that defendant PDS failed to provide the training, customer service, investigation, and correction of software problems; defendant PDS improperly maintained the APM Software; the APM Software was not fit for the purposes for which it was intended; the APM Software did not satisfy the medical accounting needs of defendant HOA; and defendant PDS misrepresented the quality of service and support it would provide to defendant HOA for the APM Software. Defendant HOA alleges that it suffered a loss of use of the APM Software following a data conversion and further suffered damages as a result of lost or corrupted patient account data created and incorporated into the APM Software. The central issue in the instant action is whether the Policy issued by plaintiff provides coverage to defendant PDS regarding the Underlying Action.

III. Motion to Strike

Defendant PDS submits as evidence an expert witness report of college professor George Flanigan. In his affidavit, Mr. Flanigan states that, through his research, experience, and education, he learned the industry standards regarding both commercial and personal lines insurance claims practices and procedures. Mr. Flanigan offers his opinions concerning whether there is coverage under the Policy for defendant HOA's claims; whether plaintiff has a duty to defend under the Policy; whether plaintiff's complaint in the instant action violates Kan. Stat. Ann. § 40-2404(9)(n); whether plaintiff's coverage

position is in bad faith; whether the terms of the Policy are ambiguous; and the meaning of various terms that are defined within the Policy.

The admission or exclusion of evidence lies within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1099 (10th Cir. 1991). Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. Plaintiff sets forth several bases upon which this court should strike the expert opinions of Mr. Flanigan, the first of which the court finds compelling. Plaintiff argues that expert testimony is not appropriate to interpret an insurance contract. The court notes that, in defendant PDS's response brief, defendant PDS wholly failed to address this argument.

The construction of a written contract of insurance is a matter of law for the court, *Catholic Diocese of Dodge City v. Raymer*, 251 Kan. 689, 691, 840 P.2d 456 (1992), and not a question of fact for the trier of fact. In *Austin Fireworks, Inc. v. T.H.E. Ins. Co.*, 1993 WL 484214, at *1 (D. Kan. Aug. 2, 1993), the insured sought a declaratory judgment that its insurance policy provided coverage for personal injuries. Citing Rule 702, the court emphasized that expert testimony may be allowed if technical or other specialized knowledge would ***assist the trier of fact*** to understand the evidence or ***determine a fact in issue***. *Id.* The court concluded that the construction of a written insurance contract is a matter of law and, accordingly, held that expert testimony was inadmissible to decide the meaning and application of the insurance policy. *Id.*

Similarly, in the case at hand, the court determines that there are no facts in issue. Rather, the present dispute requires an interpretation of an insurance policy. As such, expert testimony is unnecessary for the court to decide the issue of law presented, which is the construction of the Policy. The court will not consider the expert opinions of Mr. Flanigan. Plaintiff's Motion to Strike is granted.

IV. Motions for Summary Judgment

A. Rules of Insurance Contract Construction

Plaintiff asserts that it has neither a duty to defend nor a duty to provide coverage to defendant PDS. "The duty to defend and whether the policy provides coverage are not necessarily coextensive." *Spivey v. Safeco Ins. Co.*, 254 Kan. 237, 246, 865 P.2d 182 (1993). An insurer has a duty to defend if there is a potential for liability under the contract. *Id.* at 245, 865 P.2d 182. The determination of whether there is a duty to defend ultimately depends upon whether coverage exists under an insurance policy. *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 709-10, 732 P.2d 741 (1987) (citing *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 684, 512 P.2d 403 (1973)); *Cas. Reciprocal Exch. v. Thomas*, 7 Kan. App. 2d 718, 647 P.2d 1361 (1982) (holding that insurer has no duty to defend if there is no coverage).

The duty to defend rests primarily on the possibility that coverage exists, and the possibility of coverage must be determined by a good faith analysis of all information the insurer may know or could have reasonably ascertained. If ambiguities in coverage, including exclusionary clauses, are judicially determined against the insurer, the ultimate result controls the insurer's duty to defend. *Aselco, Inc. v. Hartford Ins. Group*, 28 Kan. App. 2d 839, 847, 21 P.3d 1011 (2001) (quoting *Steinle v. Knowles*, 265 Kan. 545, 554, 961 P.2d 1228 (1998)).

To determine whether an insurance contract is ambiguous, the court must consider, not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean. *Hodgson v. Bremen Farmers' Mut. Ins. Co.*, 27 Kan. App. 2d 231, 233, 3 P.3d 1281 (1999). This should not be confused with the insured's uninformed expectations of the policy coverage; it only requires the policy to be read as a reasonably prudent insured would read it. Where an insurance contract is not ambiguous, the courts will not make another contract for the parties but will enforce the contract as written. *Elliott v. Farm Bureau Ins. Co. Inc.*, 26 Kan. App. 2d 790, 793, 995 P.2d 885 (1999). An insurance policy is not ambiguous unless there is a "genuine uncertainty as to which of two or more possible meanings is proper." *Crescent Oil Co. v. Federated Mut. Ins. Co.*, 20 Kan. App.2d 428, 433, 888 P.2d 869 (1995). The policy must be read as a whole. *Lightner v. Centennial Life Ins. Co.*, 242 Kan. 29, 35, 744 P.2d 840 (1987).

B. Coverage Under the Policy

Section II of the Policy, entitled "Business Liability," states as follows:

> A. Coverages
>
> 1. Business Liability
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies.

(Policy ¶ II.A.1.a.). It is undisputed that defendant HOA makes no claims against defendant PDS for bodily injury or personal injury. Thus, the court must determine whether defendant HOA's alleged losses are considered property damage or advertising injury.

1. Advertising Injury

The Policy provides coverage for advertising injury caused by an offense committed in the course of advertising defendant PDS's goods, products, or services. Specifically, the Policy defines "advertising injury" to include the following offenses: 1) libel or slander; 2) violation of right to privacy; 3) misappropriation of advertising ideas; and 4) copyright infringement. (Policy ¶ II.F.1.). Defendant PDS suggests that defendant HOA's claim for negligent misrepresentation qualifies as an advertising injury because the alleged misrepresentations were made in the course of advertising defendant PDS's goods, products, or services.[1]

Clearly, the Policy specifically enumerated those offenses for which it would provide coverage, and negligent misrepresentation was conspicuously absent from the list of such offenses. A reasonably prudent insured would not read the Policy to include coverage for a claim of negligent misrepresentation under the guise of an advertising injury. Moreover, upon a cursory review, the court found other cases holding that negligent misrepresentation is not considered an advertising injury. *See, e.g., Dugger v. Upledger Inst.*, 795 F. Supp. 184, 188 (E.D. La. 1992) (holding that advertising injury, defined in the insurance policy as libel or slander, violation of privacy, misappropriation, or copyright infringement, does not cover negligent misrepresentation claim); *Westowne Shoes, Inc. v. City Ins. Co.*, 1996 WL 175084, at *2 (7th Cir. April 11, 1996) (same). The court concludes that a claim for negligent misrepresentation does not fall within the Policy's definition of an advertising injury.

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[1]The court notes that defendant PDS initially proposed such an argument in its Motion for Summary Judgment. However, in response to plaintiff's Motion for Summary Judgment, defendant PDS made no attempt to respond to plaintiff's argument that the alleged damages were not covered under the advertising injury provision. In any event, the court will rule on the merits of this issue.

2. Property Damage

The court next turns to whether defendant HOA's claims against defendant PDS are covered under the Policy as property damage. The Policy defines "property damage" as follows:

> F. Liability and Medical Expenses Definitions
> 13. "Property Damage" means:
> 1. Physical injury to tangible property, including all resulting loss of use of that property. . . .
> 2. Loss of use of tangible property that is not physically injured.

(Policy ¶ II.F.13.). The Underlying Action contains no allegations of physical injury. Thus, the court must decide whether defendant HOA's claims against defendant PDS allege a loss of use of ***tangible property***.

The court does not believe, as defendant PDS argues, that the property damage at issue is still an open question. The parties stipulated in the Pretrial Order that the property damage sought by defendant HOA in the Underlying Action is limited to "the loss of use of the Advanced Practice Manager Software and lost or corrupted patient account data." Moreover, as set forth in plaintiff's statement of facts, which defendant did not controvert, the loss alleged by defendant HOA "is limited to the loss of use of the Advanced Practice Manager software and lost or corrupted patient account data created and incorporated into the Advanced Practice Manager software." Upon review of the petition in the Underlying Action, which this court considers in determining whether plaintiff denied in good faith a defense and coverage, the court concludes that this is the type of loss which defendant HOA alleges. Specifically, defendant HOA alleges that it "was unable to properly detect and timely submit claims to insurers" and that its "staff devoted more than 5,000 additional labor hours researching and correcting erroneous reports and balances." (Petition ¶¶ 19 and 20).

Defendant PDS also argues that the loss of use of the APM Software encompasses both the loss of use of software and hardware "because the software is useless unless there is tangible equipment in which it can operate." Defendant contends that the software and hardware are tied to together and that idle hardware is the loss of tangible property. The court agrees that software and hardware are tied together insofar as software is functional only if there is hardware upon which it can operate. However, such a proposition does not lead to the conclusion that dysfunctional software inevitably leads to idle hardware. In other words, the loss of use of a particular computer software does not necessarily lead to the loss of use of computer hardware–the computer hardware may quite possibly still function.

Nowhere in the Underlying Action does defendant HOA allege that its computer hardware was damaged in any way or that its computer hardware sat idle as a result of the alleged defects with the APM Software. Rather, the petition alleges damages based only upon the problems defendant HOA experienced with the APM Software. The court therefore concludes that defendant HOA asserts claims in the Underlying Action for damages based upon the loss of use of the APM Software and the lost or corrupted patient account data incorporated therein.

Having made the foregoing determination, the court turns to whether the loss of use of the APM Software and corresponding account data constitute tangible property. The court could find no Kansas case addressing the specific issue of whether computer software or computer data qualify as tangible property under a general liability insurance policy. However, on at least two occasions, the Kansas Supreme Court has held that application programs or computer software do not constitute tangible property for the purposes of taxation. *See In re Strayer*, 239 Kan. 136, 593-94, 716 P.2d 588 (1986) ("Application programs, those which are particularized instructions adopted for special programs, are

intangible property not subject to the personal property tax for tangible property."); *In re AT&T Techs.*, 242 Kan. 554, 570, 749 P.2d 1033 (1988) (holding that computer software was not tangible property subject to compensating tax). Moreover, tangible property has been interpreted under Kansas law as "property that has physical form and substance and is not intangible. That which may be felt or touched, and is necessarily corporeal, although it may be either real or personal (e.g. ring or watch)." *Lapeka, Inc. v. Sec. Nat'l Inc. Co., Inc.*, 814 F. Supp. 1540, 1549 (D. Kan. 1993).

Applying a similar definition of tangible property, a federal district court recently held that computer data and software were not tangible property covered under a general liability insurance policy. *See America Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F. Supp. 2d 459 (E.D. Va. 2002). In *America Online*, the insured, America Online (AOL), brought an action seeking a declaration that its insurance company had a duty to defend against claims against AOL alleging that the AOL Internet Access Software damaged customer's computers and their software and data. The policy at issue in *America Online* defined property damage as "physical damage to tangible property of others, including all resulting loss of use of that property; or loss of use of tangible property of others that isn't physically damaged." *Id.* at 466. Defining tangible property as "something that is capable of being touched or perceptible to the senses," the court found that computer data, software and systems are intangible items stored on a tangible vessel--the computer or a disk. *Id.* at 469-70. Accordingly, the court held that the policy did not cover damage to computer data, software and systems because such items are not tangible property. *Id.* at 469; *see also State Auto Prop. & Cas. Ins. Co. v. Midwest Computers & More*, 147 F. Supp. 2d 1113, 1116 (W.D. Okla. 2001) (holding that insurer owed no duty to defend against claims alleging negligent performance of service work on a computer system causing computer data loss because

"computer data cannot be touched, held, or sensed by the human mind; it has no physical substance. It is not tangible property."). The *America Online* court also determined that claims of the loss of use of or access to a computer are intangible. *Id.* at 469 ("There is nothing physical about the loss of use or access to a computer. The [complaint] does not allege physical injury to the body or substance of the computer.").

As previously stated, the Underlying Action is limited to allegations of the loss of use of the APM Software and the lost or corrupted patient account data incorporated therein. Applying the rationale of the foregoing cases to the facts at hand, the court concludes that defendant HOA does not assert a claim resulting from injury to tangible property or the loss of use of tangible property. Neither the APM Software nor the data incorporated therein constitute tangible property because neither has any physical substance and neither is perceptible to the senses.

Having concluded that the damages alleged in the Underlying Action result from neither bodily injury, property damage, personal injury, nor advertising injury, the court holds that plaintiff has no duty to defend because there is no potential for liability under the Policy. Correspondingly, plaintiff has no duty to indemnify defendant PDS for those claims asserted in the Underlying Action. The Policy simply does not cover defendant HOA's claims.

3. Occurrence

Even assuming, arguendo, that defendant HOA's claims in the Underlying Action alleged property damage of the type covered under the Policy, the court would still find no duty to defend or indemnify on the part of plaintiff. The policy expressly states that the insurance applies to property damage only if that property damage "is caused by an 'occurrence.'" (Policy ¶ II.A.1.b.(1)a.). The

Policy further defines "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.* ¶ II.F.10.). Under Kansas law, an "accident," within the meaning of a liability insurance policy, is defined as an "undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force." *Harris v. Richards*, 254 Kan. 549, 553, 867 P.2d 325, 328 (1994) (quotation omitted).

Defendant PDS argues that defendant HOA's claims in the Underlying Action should be construed as occurrences. Providing no legal analysis or caselaw in support, defendant PDS relies solely on an internal memorandum, purportedly authored by an employee of plaintiff signed as "da," stating that an allegation of negligent misrepresentation can be an accident, and thus an occurrence, covered by liability insurance. The unidentified author further states that the State of Missouri "recognizes a cause of action for negligent mis., if such claim is distinguishable from an intentional mis. claim due to the absence of intent to deceive" and that Count V (negligent misrepresentation) "should probably be pursued by the insurer on behalf of the insured in the underlying litigation."

Foremost, the court notes that defendant PDS has failed to establish the requisite foundation for consideration of the memorandum as evidence. Attached merely as an exhibit to defendant PDS's Motion for Summary Judgment, the record contains no information about who authored the memorandum, under what conditions, or with what authority. Plaintiff proffers that at no time during the pendency of this litigation did defendant PDS seek to discover the identity of the parties to the memorandum, the parties' respective relation to plaintiff, or the genuineness of the memorandum. The Court will not consider the "da" memorandum because defendant PDS provides no foundation for its

admissibility in evidence. *See Long v. Owens Corning*, 214 F. Supp. 2d 1124, 1127 n.7 (D. Kan. 2002) (citing *Orr v. Bank of Am.*, 285 F.3d 764, 773-74 (9th Cir. 2002)).

The court concludes that defendant HOA's claims for breach of contract, breach of warranty, negligence/malpractice, fraud, and negligent misrepresentation are not accidents within the meaning of the Policy. The claims asserted by defendant HOA which allege intentional conduct most certainly are not accidental. Moreover, with respect to defendant HOA's negligence claims, the court turns to the rationale set forth in *U.S. Fidelity and Guaranty Co. v. Dealers Leasing, Inc.*, 137 F. Supp. 2d 1257 (D. Kan. 2001), which held:

> This court believes that, if faced with the issue, the Kansas Supreme Court would conclude that such negligence and negligent misrepresentation does not constitute an "accident." While negligence often leads to an accident, negligent behavior is not itself an "accident." *See* Couch on Insurance § 126:26 (3d ed.) ("The word 'accident' implies a misfortune with concomitant damage to a victim, and not to the negligence which eventually results in that misfortune."). This interpretation is consistent with the generally accepted definition of an "accident" set out by the Kansas Supreme Court. Negligent conduct itself is not an undesigned, sudden, or unexpected event of an afflictive or unfortunate character, but often the cause of such an event.

Id. at 1262. In the case at hand, the negligent behavior alleged by defendant HOA is not itself an "occurrence" within the meaning of the Policy. Having concluded that the damages alleged in the Underlying Action did not result from an occurrence, the court holds that plaintiff has no duty to defend based on the fact that there is no potential for liability under the Policy, nor does plaintiff have a duty to indemnify defendant PDS for those claims asserted in the Underlying Action.

Because the court has held that defendant HOA's claim injuries in the Underlying Action do not constitute "property damage" or "advertising injury," nor did defendant HOA's claims result from an

"occurrence," the court need not decide whether the Policy's exclusionary provisions preclude coverage for or a defense to the Underlying Action.

IT IS THEREFORE ORDERED that plaintiff's Motion to Strike (Doc. 51) is granted, defendant PDS's Motion for Summary Judgment (Doc. 38) is denied, and plaintiff's Motion for Summary Judgment (Doc. 48) is granted. The court hereby issues the following declaratory judgment:

1. Cincinnati Insurance Company has no duty to defend defendant Professional Data Services, Inc. against the claims asserted by Heart of America Eye Care, P.A. in the case captioned *Heart of America Eye Care, P.A. v. Professional Data Services, Inc.*, 02-CV-02345, District Court of Johnson County, Kansas.

2. Cincinnati Insurance Company has no duty to indemnify defendant Professional Data Services, Inc. with respect to the claims asserted by Heart of America Eye Care, P.A. in the case captioned *Heart of America Eye Care, P.A. v. Professional Data Services, Inc.*, 02-CV-02345, District Court of Johnson County, Kansas.

This case is hereby dismissed.

Dated this 18 day of July 2003, at Kansas City, Kansas.

s/ Carloes Murguia
CARLOS MURGUIA
United States District Court Judge